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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

PYRO MINING COMPANY,

Petitioner,

v.

DANNY R. SMITH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit Court of Appeals incorrectly applied precedent of this Court or whether such precedent was incorrectly decided if it results in a finding that an employer violates Title VII by failure to reasonably accommodate an employee who on religious grounds absolutely refuses Sunday work and absolutely refuses to solicit voluntary swapping of shifts where the employer establishes rotating shifts for assignment of Sunday work and allows shift-swaps by co-workers.

2. Whether a Panel decision of the Sixth Circuit Court of Appeals violates the doctrine of *stare decisis* by its failure without an *en banc* hearing to follow binding precedent within the circuit in holding that an employer's assignment of Sunday work on the basis of seniority with voluntary shift-swapping allowed by employees is not a reasonable accommodation of an employee who absolutely refuses Sunday work and absolutely refuses to solicit voluntary shift-swaps with fellow employes.

3. Whether Title VII as interpreted by the Sixth Circuit violates the Establishment Clause of the First Amendment of the United States Constitution where such an interpretation results in a finding that an employer violates Title VII despite establishing a neutral policy for assigning Sunday work with voluntary shift-swapping by employees and an employee absolutely refuses, on religious grounds to accept

Sunday work or solicit voluntary shift-swaps with fellow employees.*

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*Defendant-Petitioner Pyro Mining Company is an Illinois general partnership composed of two general partners: (1) W. K. Y. Mining (Pyro), Inc., a direct subsidiary of Pyro Energy Corporation, and (2) Costain Mining (Pyro), Inc., a direct subsidiary of Costain Coal, Inc. Danny R. Smith is the Plaintiff-Respondent and only other party to the above litigation.

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OPINIONS DELIVERED IN THE COURTS BELOW

1. Danny R. Smith v. Pyro Mining Company, No. C-83-0126-0(M), slip op. (W.D. Ky. October 22, 1985).
2. Smith v. Pyro Mining Company, No. 85-6063, slip op. (6th Cir. September 1, 1987).

JURISDICTIONAL BASES

This Petition for Writ of Certiorari seeks timely review of the Sixth Circuit Court of Appeals decision in *Smith v. Pyro Mining Company*, No. 85-6063, slip op. (6th Cir. September 1, 1987), pursuant to 28 U.S.C. § 2101(c).

The denial of Defendant-Petitioner Pyro Mining Company's Motion for Rehearing *En Banc* was entered on November 18, 1987. This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 2101.

Insofar as this Petition for Writ of Certiorari draws in question the constitutionality of Title VII of the Civil Rights Act of 1964 as interpreted by the Sixth Circuit Court of Appeals, 28 U.S.C. § 2403(a) may be applicable and a copy of the Petition has been served upon the Solicitor General, Department of Justice, Washington, D. C. 20530. The trial court and the Sixth Circuit Court of Appeals have not certified to the Attorney General the fact that the constitutionality of Title VII was drawn in question.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Title VII of the Civil Rights Act of 1964, as amended, provides in part:

> It shall be an unlawful employment practice for an employer—
>
> 1. To . . . discharge . . . or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privilege of em-

> ployment, because of such individual's . . . religion . . .; or
>
> 2. To limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion. . . .

42 U.S.C. § 2000e-2(a). Title VII defines religion subject to protection under the Act as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

I. STATEMENT OF THE CASE

Defendant-Petitioner Pyro Mining Company (hereinafter "Pyro") hired Danny R. Smith (hereinafter "Smith") as a mechanic to work in an underground coal mine. For the first year of Smith's employment, the Company operated on a standard five-day, eight-hour workweek. Smith worked one hour on Sundays when scheduled for the 11:00 p.m. to 7:00 a.m. shift without objection.

On July 11, 1982, Pyro implemented an eight-day workweek for production personnel in order to improve equipment usage and reduce safety hazards. Under the new schedule, employees worked four consecutive ten-hour

days and then received four days off. This required each employee to work some, but not all, Sundays during the year. Employees were allowed to swap shifts with other willing employees, provided management was notified prior to the shift.

After Smith missed his first two scheduled Sunday shifts, Smith's foreman reviewed with him the company policy calling for employees to attempt to arrange shift swaps and the company's open door policy whereby employees with work-related grievances could present the matter, first to their immediate supervisor, then up through the chain of command, eventually reaching the president of the company.

Although Smith did not avail himself of the company's open door policy, Smith asked two of twenty available employees to swap shifts with him. When this was unsuccessful, Smith informed his foreman that his religious beliefs prohibited him from arranging a shift swap. Because Smith decided at this point that it would be as much of a sin for him to ask co-workers to work for him on a Sunday as it would be for him to work on a Sunday, the foreman promised to ask his own son to swap with Smith. Pyro did not set up a system to solicit other employees to swap with Smith. On Sunday, August 22, 1982, Smith did not report to work and received a third unexcused absence report. In accordance with company policy, Smith was discharged on Monday, August 23, 1982, for the receipt of three unexcused absences within a six-month period.

At the time of his discharge, Smith proposed that the company allow him to work additional days in excess

of the regular shift without overtime pay to make up for his Sunday absences. Smith also proposed that he be transferred to a "surface job" which would not have required Sunday work. These suggestions were rejected by Pyro because the Sunday crew could not work pursuant to mine safety operations without a qualified mechanic on duty, such overtime would violate the Fair Labor Standards Act, 29 U.S.C. § 207, and because no "surface job" was presently available.

Smith filed suit in the United States District Court in the Western District of Kentucky, Owensboro Division, alleging violations of Title VII. The jurisdiction of the district court was invoked pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343(4). On October 22, 1985, the district court entered judgment in Smith's favor on the basis that Pyro had failed to reasonably accommodate Smith's religious beliefs. A split Panel of the Sixth Circuit Court of Appeals affirmed the decision of the district court. Subsequently, Pyro moved for rehearing *en banc* which was denied.

A. Bases for Exercise of Discretion to Grant Petition for Writ of Certiorari.

The decision of the Sixth Circuit Court of Appeals conflicts with the decision of the Fourth Circuit Court of Appeals in *EEOC v. Ithaca Industries,* 44 F.E.P. Cases 1572 (W.D.N.C. 1986), *aff'd,* 126 L.R.R. 21 (4th Cir. October 12, 1987), and raises an issue of the constitutionality of Title VII. Both cases involved employers who shifted to new rotating schedules requiring Sunday work. The employee in each case absolutely refused to work on Sun-

days and never asked anyone else to fill in for him or offered the employer any substitute worker.

The Fourth Circuit found that the employee's absolute refusal to work on Sundays forced the employer to either totally accede to the employee's refusal and assign other workers to perform plaintiff's Sunday work *or* replace plaintiff with someone willing to make reciprocal accommodations. In so holding, the Fourth Circuit rejected an interpretation of Title VII which would require the employer to discriminate against some employees in order to accommodate the Sabbath observance of the plaintiff. The court reasoned that Title VII does not mandate the EEOC's suggestions in *Ithaca* that the employer compel other shift workers to substitute, to require double shifts of some employees, or locate employees on a different shift to perform plaintiff's work. The employer fulfilled its statutory duty of reasonable accommodation by adopting a nondiscriminatory procedure for assigning Sunday work where the employee's absolute refusal to work on Sundays makes further accommodation useless.

On analogous facts herein, the Sixth Circuit has held that Pyro violated Title VII. Smith absolutely refused Sunday work and absolutely refused to solicit replacements. The Sixth Circuit held that Pyro violated Title VII by not soliciting replacement employees to perform Smith's work. In *Ithaca*, the employer also failed to solicit replacement employees for the plaintiff, but the Fourth Circuit ruled that the employee's absolute refusal to work on Sundays made further accommodation unnecessary under Title VII. The cases are directly in conflict.

The decision of the Sixth Circuit also directly conflicts with the decisions of other circuits finding that the neutral policy of assigning Sunday work on the basis of rotating shifts is a reasonable accommodation to employees with religious objections to Sunday work. *Brener v. Diagnostic Center Hospital,* 671 F.2d 141 (5th Cir. 1982); *U. S. v. City of Albuquerque,* 545 F.2d 110 (10th Cir. 1976).

As discussed below, the Sixth Circuit's interpretation of the reasonable accommodation required of an employer under Title VII violates the Establishment Clause of the First Amendment of the United States Constitution. Therefore, there is a split among the circuits as to an interpretation of Title VII's reasonable accommodation requirement that raises constitutional questions which should be resolved by this Court.

As a second basis for granting the Petition for Writ of Certiorari, the Panel majority's decision not to follow the binding circuit precedent of *Dewey v. Reynolds Metals Co.,* 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court,* 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), is a breach of *stare decisis.* The Panel's disregard of *Dewey* without the benefit of a hearing *en banc* has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

As a third basis for granting the Petition for Writ of Certiorari, the Sixth Circuit has imposed in *Smith v. Pyro* a standard of reasonable accommodation under Title VII which is both contrary to precedent of this Court and in violation of the Establishment Clause of the First Amendment to the United States Constitution. The Decision of

the Sixth Circuit raises important questions of federal law which have not been, but which should be settled by this Court, including: whether a subjective or objective standard is to be applied under Title VII in determination of whether an employee's belief is a tenet of his religion or merely a preference based on convenience and expediency. *Smith v. Pyro*, No. 85-6063, slip op. (6th Cir. September 1, 1987) (Krupansky, J., dissenting).

B. The Decision Below Either Incorrectly Applied Hardison or Hardison Violates the Establishment Clause.

In the instant case, the Sixth Circuit Court of Appeals held that Pyro did not reasonably accommodate Smith's religious beliefs and failed to demonstrate that all other efforts at accommodation would impose undue hardship on Pyro.

Smith holds two religious beliefs which restrict his employment. First, Smith absolutely refuses to perform any Sunday work. Secondly, Smith absolutely refuses to solicit voluntary shift swaps with co-workers for Sunday work. The ruling of the Sixth Circuit ignores the first belief and focuses on whether Pyro reasonably accommodated Smith's refusal to solicit voluntary replacements.

This misapplies the principle that an employer is not required under Title VII to incur undue hardship in the accommodation of the employee's religious belief. *Trans World Airlines v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). To bear more than a *de minimis* cost is to bear an undue hardship. *Id.* The Sixth Circuit has misapplied *Hardison* in holding that Pyro did not reasonably accommodate Smith and in finding that reasonable

accommodation requires Pyro to solicit voluntary swaps for Smith where Smith absolutely refuses to perform Sunday work.

In *Hardison*, the plaintiff was a member of a religious group which espoused a tenet that prohibited any work on the Sabbath from sunset Friday until sunset Saturday. Hardison was subject to a seniority system contained in a collective bargaining agreement under which the most senior employees had first choice for job and shift assignments. Hardison did not have enough seniority to bid for a shift having Saturdays off. TWA could not leave Hardison's job vacant because of its important maintenance function, and employing someone else to substitute for Hardison would have required paying premium overtime wages. TWA did, however, authorize Hardison's union steward to search for a replacement for him, but did not seek out a replacement itself. When an accommodation satisfactory to both employer and employee could not be reached, Hardison refused to report to work on Saturdays. As a consequence, he was discharged for insubordination.

Once a *prima facie* case of religious discrimination is established, the employer must show either that it reasonably accommodated the employee's religious needs *or* that to do so would impose an undue hardship on the employer. *Ansonia Board of Education v. Philbrook*, 479 U.S. —, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986). Where the employer reasonably accommodated the religious needs, "the statutory inquiry is at an end." *Id.*, 107 S.Ct. at 372. The issue of undue hardship arises "only where the employer claims that it is unable to offer any reasonable accommodation without such hardship." *Id. Hardison* establishes that a

neutral system for allocating the burdens of weekend work, such as a seniority-based or rotation system, is a reasonable accommodation of employees' secular and religious needs. Pyro's eight-day workweek constituted such a neutral system.

Further, Pyro permitted employees to arrange shift swaps for days they preferred not to work. Such shift swapping constitutes a reasonable accommodation of an employee's religious needs. *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982); *U. S. v. City of Albuquerque*, 545 F.2d 110 (10th Cir. 1976); *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed. 2d 267 (1971). As noted above, after minimal efforts, Smith refused to attempt to arrange shift swaps.

The Sixth Circuit and the trial court herein incorrectly framed the reasonable accommodation question below as "whether an employer reasonably accommodates an employee by allowing the employee to arrange a shift trade himself when the employee considers it a sin to arrange such a swap." *Smith v. Pyro*, No. 85-6063, slip op. at 13 (6th Cir. September 1, 1987). Although Pyro could have implemented its own solicitation program for volunteers to swap with Smith, the Sixth Circuit is flat *wrong* that the implementation of such a program would require no more than a *de minimis* cost to Pyro.

Smith's absolute refusal to perform Sunday work, plus his absolute refusal to cooperate in the solicitation of voluntary replacements, makes it impossible for Pyro to reasonably accommodate Smith without incurring undue hardship; *i.e.*, incurring more than *de minimis* expense.

Under the Sixth Circuit's rule, Pyro is forced to retain an employee who will never show for Sunday work and to institute a company solicitation program which will not reliably insure that a substitute will be found so that prudent management of the business can be exercised.

Smith is a mechanic and nine safety regulations require the presence of a mechanic on each underground crew. Underground mining is one of the most dangerous of worker occupations and the mechanic position is vital for mine safety. It is an undue burden on Pyro's operations to have such a lack of certainty as to the attendance of key and necessary personnel. On those Sundays when Smith is scheduled to work, management cannot be assured without Smith's cooperation in a voluntary shift-swapping program that the necessary personnel will be available.

Even so, such a company program was not suggested by Smith. Perhaps Smith's religious beliefs also prohibit Smith from asking Pyro to solicit replacements on his behalf. This is not clear from the record, because Smith, in effect, would be accepting the benefits of the company's sinful solicitation much the same as he was willing to accept the benefits of a sinful volunteer who was willing to perform Smith's Sunday work. Smith has a duty to cooperate with Pyro in arriving at a reasonable accommodation. *Chrysler Corporation v. Mann,* 561 F.2d 1281, 1285 (8th Cir. 1977). Consistent with the congressional goal of eliminating religious discrimination, "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Board of Education v. Philbrook,* 479 U.S. —,

107 S.Ct. 367, 93 L.Ed.2d 305, 315 (1986) (quoting *Brener v. Diagnostic Center Hospital,* 671 F.2d 141, 145-146 [5th Cir. 1982]). Smith's religious belief against soliciting volunteers prevents the cooperative accommodation envisioned by Title VII.

But, even if Smith's religion prevents him from requesting that Pyro solicit his replacements, it is unfair hindsight for a trial court and court of appeals to later generate possible methods of accommodation which the employer did not have an opportunity to show at trial would cause undue hardship. The employer who has offered a reasonable accommodation is not required to choose any particular accommodation. *Id.* The Sixth Circuit's analysis incorrectly asks whether Pyro could have done more than it did rather than whether Pyro did enough to reasonably accommodate the religious belief.

The Sixth Circuit is also incorrect in concluding that implementation of a company solicitation program would impose only *de minimis* costs. The Sixth Circuit may be correct that only *de minimis* cost is required to post a single sign-up memo, but a company policy clearly also involves supervisor and management time to review volunteer names to insure that the substitute from another shift is a mechanic, that the substitute has not recently worked so long that the additional overtime would create a safety hazard, or that federal wage laws do not require overtime pay for the substitute.

In short, the Sixth Circuit concentrates narrowly on the cost of actions to implement the solicitation policy and ignores the cost to Pyro of trying to function within such a voluntary transfer system without the cooperation

of the employee. It is an undue burden on the employer to be forced by the government to manage its business under such an uncertain replacement system.

Pyro implemented a voluntary shift-swapping system to supplement the rotating shift assignment of Sunday work. Under such a system, Pyro can reasonably rely on the efforts of even those employees with absolute objections to Sunday work to strive to retain their jobs. The employee responsible for obtaining his own replacement will actively solicit substitute employees with the necessary exhaustive inquiries of all co-workers and can be relied upon to undertake whatever necessary cajoling or side deals may be needed to induce a replacement's consent. It is the effort of those employees seeking a voluntary replacement which makes the system work. Without the employee's cooperation, the system has too little likelihood of success to provide a predictable basis for prudent management.

Smith will make no efforts to solicit volunteers because of his religious belief. Pyro is constrained by Title VII not to discriminate against other employees by pressuring such workers to substitute because of Smith's Sabbath or to arbitrarily assign Smith's Sunday work to those not absolutely opposed to Sunday work. The Sixth Circuit would force Pyro to manage its business under the uncertainties of Smith's attendance in a solicitation system where there is merely a sign-up sheet. Only employees preferring Sunday work or desiring the extra money could reasonably be anticipated to volunteer. Neither Smith nor Pyro would be providing any additional incentive to the volunteer. Smith is not willing to work Saturdays or other holidays for the volunteer. With so

little incentive for the replacements, Pyro cannot reasonably anticipate that Smith's position on the Sunday crew will invariably or even normally be filled. It is impossible for Pyro to prudently plan the assignment of its crews, support personnel, production plans, etc. on a voluntary substitution program with so little reliability. The company policy directed by the Sixth Circuit as required by Title VII imposes an undue burden on the employer.

The Sixth Circuit has either misapplied *Hardison* to impose an accommodation which unduly burdens Pyro or *Hardison* was wrongly decided if it requires such accommodation in violation of 42 U.S.C. 2000e(j). The religious accommodation mandated of employers by Title VII cannot be so restrictive of the employer's business as the Sixth Circuit holds without sacrificing the secular purposes of a business to the promotion of religion in violation of the Establishment Clause. Where the employer cannot prudently manage his business because of the intrusive government requirements to accommodate religion in the fashion above, those government requirements advance religion in violation of the Establishment Clause.

C. The Panel Decision to Disregard Dewey Violates Stare Decisis.

The Panel majority's decision to disregard *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), without an *en banc* hearing of the Sixth Circuit violated the doctrine of *stare decisis*. Pyro was unfairly denied the judicial stability provided by *stare decisis* where Pyro relied upon a directly appli

cable prior case within the circuit which was disregarded by two judges of a three-member panel.

The doctrine of *stare decisis* is deeply rooted in our tradition of common law. The Supreme Court has said:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. *The reasons for rejecting any established rule must always be weighed against these factors.*

Moragne v. States Marine Lines, 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d 339, 358 (1970) (emphasis added). The interpretation of the rule of *stare decisis* is left to each court. *Hertz v. Woodman,* 218 U.S. 205, 212, 20 S.Ct. 621, 622, 54 L.Ed. 1001, 1005 (1910).

The Sixth Circuit has decided how the rule of *stare decisis* will be applied. A panel decision remains controlling unless an inconsistent decision of the Supreme Court requires modification, *Salmi v. Secretary of Health and Human Services,* 774 F.2d 685, 689 (6th Cir. 1985), there is a change in the substantive law, *Smith v. U.S. Postal Service,* 766 F.2d 205, 207 (6th Cir. 1985), or the Sixth Circuit sitting *en banc* overrules the decision. It is clear, as Judge Engel said, "[t]hat if the majority concluded that [*Dewey*] should no longer be followed in this circuit, it was under a duty to seek *en banc* reconsideration of the question." *Riddle v. Secretary of Health and*

Human Services, 817 F.2d 1238, 1244 (6th Cir. 1987) (Engel, J., dissenting), *reh'g granted*, 823 F.2d 164 (6th Cir. 1987).

In *Dewey v. Reynolds Metals Co.*, an employee who was scheduled to work on successive Sundays initially agreed to obtain replacement workers. He later refused to obtain a replacement, citing religious beliefs. On successive Sundays he refused to arrange a replacement, and was terminated for excessive absenteeism.

The court noted Title VII did not then require reasonable accommodation for religious beliefs. The EEOC, however, had promulgated guidelines establishing "an obligation on the part of the employer to make reasonable accommodations . . . where such accommodations can be made without undue hardship." 29 C.F.R. § 1605.1(b) (1967), quoted in *Dewey v. Reynolds Metals Co.*, 300 F. Supp. 709, 712 (W.D. Mich. 1969).

Although the *Dewey* panel expressed uncertainty about the statutory authority for this regulation, and the propriety of its retroactive application, the court held:

> But even if the 1967 regulations are applied, we think that Reynolds complied with Section 1605.1(b) thereof by making a reasonable accommodation to the religious needs of its employees when it permitted Dewey, by the replacement system, to observe Sunday as his Sabbath. He stubbornly refused to exercise the privilege.

Dewey v. Reynolds Metals Co., 429 F.2d at 331. *Dewey* explicitly held that under the EEOC regulation, the employer who establishes a neutral assignment of Sunday work but does not solicit substitutes for an employee does

not violate Title VII even if the employee refuses on religious grounds to solicit his own replacements.

In the instant case, Smith was scheduled to work on Sundays and he attempted to swap shifts by contacting two co-employees. Smith then decided arranging shift swaps was against his religious beliefs. He failed to report for work as scheduled, and eventually was terminated for absenteeism. The instant case fits perfectly within *Dewey*. In 1972 Congress amended Title VII to add 42 U.S.C. § 2000e(j), requiring that, "an employer demonstrate that he is unable to reasonably accommodate . . . religious observance or practice without undue hardship." Only the source of the rule of law to be applied changed between *Dewey* and *Smith*, not the substance or even the wording of the rule of law. A prior decision of the circuit based on a regulation later incorporated into law is binding on a panel of that circuit which considers nearly identical facts under the later statute.

The doctrine of *stare decisis* plays an important role in orderly adjudication and serves the broader societal interests in evenhanded, consistent and predictable application of legal rules. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980). The doctrine of *stare decisis*, weighty in any context, is especially so in matters of statutory construction so that Congress may cure any error made by the courts. *Cottrell v. CIR*, 628 F.2d 1127 (8th Cir. 1980). Reduced to its simplest form, *stare decisis* means that like facts will receive like treatment in a court of law. *Flowers v. U.S.*, 764 F.2d 759 (11th Cir. 1985).

Pyro reasonably relied on what was the ruling case within the Sixth Circuit. The facts of *Dewey* and *Smith*

v. Pyro are indistinguishable for the purpose of determining the employer's duty under Title VII. Pyro unfairly was deprived of the consistent, predictable administration of justice when the Panel majority violated the doctrine of *stare decisis* by declining to follow *Dewey* without requesting a rehearing *en banc* of the Sixth Circuit Court of Appeals.

Justice Roberts' comment, dissenting in *Smith v. Allwright,* 321 U.S. 649, 669, 64 S.Ct. 757, 768, 88 L.Ed. 987, 1000 (1944), is apt: "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

D. Smith's Refusal to Solicit Replacements Is a Belief Which Need Not Be Reasonably Accommodated Under Title VII.

Petitioner has shown above that the accommodation of Smith's views required by the Sixth Circuit imposes an undue burden in violation of Title VII because they impose more than a *de minimis* cost upon the employer. But Smith's belief which prohibits him from soliciting replacement workers is also not a protected belief under Title VII because: (1) it is not sincerely held by Smith, (2) it is not a religious belief but a mere preference based upon expediency, and (3) it is not a belief protected by Title VII when judged on the objective standard for determining religious from secular beliefs articulated in *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

The trial court's findings of fact, affirmed by the Sixth Circuit, stated that Smith sincerely believed that it

was morally wrong to work on Sundays in the absence of a life threatening situation. *Smith v. Pyro*, No. C-83-0126-0 (M), slip op. at 2 (W.D. Ky. October 22, 1985). The findings of fact continue, "Smith then decided that it was wrong for him personally, to ask someone to swap with him, since he was in effect, asking that person to sin. However, Smith would have worked in a company arranged swap." *Id.* at 5. Smith's willingness to ask two employees to substitute for him, and Smith's previous willingness to work from 11:00 p.m. to 12:00 a.m. on prior shifts show that his beliefs were not sincerely held but were merely expedient considerations when considered in light of his testimony at trial that he would not work any part of Sundays in the absence of a life threatening situation. His conduct conflicts with the professed strength of his beliefs, and the lower court's findings in this regard are clearly erroneous.

Further, the majority Panel's decision that Smith sincerely held his religious beliefs focuses solely on the strength with which Smith espoused the beliefs. It is not, however, the vehemence with which one holds a belief relative to one's other beliefs that should be the test of whether it is a religious belief entitled to protection under Title VII or the First Amendment. This Court should adopt the objective test applied to First Amendment issues in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), to determine whether a belief is a religious belief intended by Congress to be protected by Title VII. *Smith v. Pyro*, No. 85-6063, slip op. (6th Cir. September 1, 1987) (Krupansky, J., dissenting).

E. Title VII as Interpreted by the Sixth Circuit Violates the Establishment Clause of the First Amendment.

The Sixth Circuit's affirmance of the trial court's decision violates the Establishment Clause: first, by requiring an employer to take affirmative steps favoring one religious belief where such steps advance religion to the detriment of the secular purpose of business, and second, by impermissibly intruding into the business of a private employer in order to advance a particular religious belief through government supervision of whether the employer has adopted the least restrictive accommodation of the employee's belief.

As shown above, the voluntary replacement program for an employee who absolutely refuses to work on Sundays or to solicit volunteers places a substantial burden on the employer's ability to effectively manage his business in the face of such uncertainty as to whether a key shift employee will be present. The voluntary system of replacements will not provide enough reliability that a replacement will be found that the employer can prudently manage the business. Government mandate of such a program advances religion by subsuming the secular purposes of business to a governmental intent to foster religious beliefs in a favorable environment. There is no effort to balance secular and religious needs, but a promotion of religious belief over management's legitimate need to plan around available employees.

Secondly, the Sixth Circuit's decision violates the Establishment Clause by government intrusion into the business operations of Pyro. The Sixth Circuit concluded

that Pyro's system of rotating shifts and voluntary replacements was not a reasonable accommodation because it did not resolve the employee's conflict. If the reasonableness of the employer's efforts are evaluated on such a bottom line approach, government will be required to supervise whether the employer has exhausted every possible means to resolve the conflict. Pyro will not only be forced to implement a policy of soliciting replacements for Smith, but if the program is not successful then the government must examine such detailed business operations as whether there are additional notices that could have been posted in different areas or times which would have resolved the conflict.

The defendant employer in a Title VII case will be required to show the undue hardship of every conceivable accommodation which might be a less restrictive accommodation of the employee's religious belief. By so narrowing the criterion of what is a reasonable accommodation, the Sixth Circuit has placed on the employer who has not resolved the conflict a burden of defending his efforts against all less restrictive alternatives. The employer is deprived of the initial examination required by Title VII of whether in the circumstances his action was reasonable.

If the Sixth Circuit's decision is allowed to stand, every employer who has not resolved the conflict has made an unreasonable accommodation and is subject to the intrusive government regulation of his business in the advance of religious belief at the expense of his ability to effectively manage the business in the pursuit of secular purposes. Government will be second-guessing daily busi-

ness decisions in a far more intrusive examination than envisioned by Congress under Title VII and in violation of the Establishment Clause.

The Panel majority delineates the crux of its holding as follows:

> We think it clear that if Smith had no religious qualms about asking others to work the Sundays he was scheduled to work, then Pyro's proposed accommodation would have been reasonable.

Smith v. Pyro, No. 85-6063 at 14. A reasonable accommodation is rendered unlawfully solely because it is contrary to a newly found religious belief. Here, this Court's prior admonitions should be heeded:

> Laws are made for the government of actions and while they cannot interfere with mere religious beliefs and opinion, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of a religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878), cited in *Abington Township v. Schempp,* 374 U.S. 203, 249, 83 S.Ct. 1560, 1585-86, 10 L.Ed.2d 844, 873-74 (1963) (Brennan, J., concurring).

In our pluralistic society's employment context, elevating employee beliefs to a rule of law creates the very real prospect that a myriad of conflicting convictions are each entitled to the religious accommodation protections of Title VII. Clearly, at some point, governmental super-

vision of employee religious beliefs creates entanglement with religious practices encroaching upon the Establishment Clause.

In *Hardison,* the Court carefully avoided a First Amendment confrontation by construing the religious accommodation provisions of Title VII to require that employers bear no more than a *de minimis* burden. The greater the religious-based burden imposed by Title VII, the stronger the likelihood that governmental involvement in religious matters will unlawfully "respect" religious beliefs. Clearly, any degree of government protection of religious beliefs traverses the "extraordinarily sensitive area of constitutional law" embodied in the First Amendment. *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755 (1971).

By elevating religious beliefs above a lawful religious accommodation, the panel decision "gives rise" to the same entanglement concerns implicated in *Lemon.* The panel's test of reasonable accommodation insures that the EEOC and federal courts necessarily must measure the reasonableness of an employer's accommodation against the infinitely diverse range of employee beliefs. This standard impermissibly involves the federal government in policing religious beliefs as juxtaposed against lawful employer practices.

When the federal government becomes the final arbiter of which religious beliefs are entitled to preference, the existence of both church and state are threatened.

> [Government] and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other. It is not only the

> nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.

Abington, 374 U.S. at 259 (Brennan, J., concurring). *Accord, American Civil Liberties Union v. City of Birmingham,* 791 F.2d 1561 (6th Cir. 1986); *Americans United for Separation of Church and State v. School District of the City of Grand Rapids,* 718 F.2d 1389, 1398 (6th Cir. 1983).

The Panel majority undertakes to insure that Danny Smith is afforded the opportunity to practice his religious observances as only he defines them.

> Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake to sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function.

Abington, 374 U.S. at 218-19, 83 S.Ct. at 1569, 10 L.Ed.2d at 856 (citing *Everson v. Board of Education,* 330 U.S. 1, 52, 67 S.Ct. 504, 529, 91 L.Ed. 711, 742 [1947] [Rutledge, J., dissenting]).

As exhaustively set forth in this Court's decision in *Dayton Christian Schools v. Ohio Civil Rights Commission,* 766 F.2d 932 (1985), *rev'd other grounds,* — U.S. —, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), ongoing govern-

mental surveillance of employers' and employees' religious practices is characteristic of legislation violative of the Establishment Clause.

As the Court said, legislation "ought not to be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). The decision of the Sixth Circuit must be reversed to avoid Title VII's violation of the Establishment Clause.

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II. CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted and the Panel opinion should be reversed and the case closed.

Respectfully submitted,

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By: EDWARD KATZE
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APPENDIX 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

DANNY R. SMITH
Plaintiff

Civil Action
No. 83-0126-O(M)

vs.

PYRO MINING COMPANY
Defendant

MEMORANDUM OPINION

This case involves a claim by the plaintiff, Danny R. Smith, that his former employer, Pyro Mining Company, violated his rights as set out in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, § 2000e-2, § 2000e(j) by discharging him because of his religious beliefs. Specifically, plaintiff refused to work on Sundays and after three unexcused absences for failing to report to work on Sundays, the company discharged him. Jurisdiction is invoked pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343(4). After a one day bench trial, the Court took the case under submission to await the entry of a Stipulation of Damages by the parties.

FINDINGS OF FACT

1. The plaintiff, Danny R. Smith, began working for defendant, Pyro Mining Company, on June 19, 1981, as a mechanic and was discharged on August 23, 1982.

2. At all times relevant to this proceeding, Mr. Smith was a member of the Independent General Baptist Church

located at Cedar Hill, Kentucky. At the time of his employment with Pyro, Mr. Smith held the church offices of Treasurer and Trustee. He subsequently became a Sunday School Teacher. Mr. Smith's church has six official members and is regularly attended by thirty-five to forty people.

3. The defendant, Pyro Mining Company, operates several underground coal mining operations in Western Kentucky. During the period of Smith's employment, Pyro employed more than 1,000 individuals who worked underground and at least 150 surface employees.

4. The official doctrine of Smith's church precluded all officers and teachers in the church from Sunday employment, although Smith could have worked Sundays and remained a member of the church. Based on the teachings of his church and his own interpretation of those teachings, Smith sincerely believed that it was morally wrong to work on Sundays in the absence of a life threatening situation.

5. Although Smith believed the Sabbath to comprise the entire 24 hour period between 12:00 midnight Saturday and 12:00 midnight Sunday, he did work for a period of time on the third shift which required him to report for work at 11:00 P.M. on Sundays.

6. Prior to July, 1982, Mr. Smith was not required to work on Sundays, with the exception noted in the previous item.

7. On July 11, 1982, Pyro began an eight-day work week for production personnel employed in the mine where Smith worked. Under this system, employees were scheduled to work four consecutive ten-hour days out of eight, meaning that they had four days on and then four days

off. Under the eight-day work week, employees were scheduled to work some but not all Sundays during the year.

8. Prior to the implementation of the eight-day work week, Pyro, through the means of a video/slide presentation that utilized crude language and a format that had to be an insult to the intelligence of the great majority of those who viewed it, publicized its policy of allowing employees who objected to Sabbath work to trade shifts with other qualified employees. The sum of this publication consisted of quick references toward the end of the video between two persons portraying miners. The crux of the exchange comes when the miners are discussing the new eight-day week and Sunday work. One employee asked, "What about preachers?" The other one replies, "Hell, if they let us swap off to go fishing, I reckon they'll let the preachers swap off." The company also had a representative on hand to answer questions after the presentation.

9. Pyro had an official policy called its "Open Door Policy" whereby employees with work related grievances could present the matter, first to his immediate supervisor, then up through the chain of command, eventually reaching the president of the company. One paragraph in the employee handbook given to Smith when he began work at Pyro is devoted to a description of this policy, and as a routine matter, all new employees were supposed to be told of its existence in an orientation session on their first day of work.

10. During Smith's initial interview, prior to being employed by defendant, Smith informed Varney Coleman, Mine Superintendent for Pyro, that he had religious convictions against working on Sundays.

11. The eight-day work week was scheduled to begin on Sunday, July 11, 1982, and Smith was scheduled to work on that first day. The entire company had been on a two-week vacation and prior to that vacation, Smith had informed his immediate supervisor, David Dunbar, that he would not be reporting for work on July 11, 1982, due to his religious convictions. It would have been difficult for Smith to have arranged a swap for that first Sunday since all shifts had been instructed to report to work that first day. Smith called the office on Sunday, July 11, and left word that he would not be reporting to work since he was going to church. He was subsequently given an unexcused absence.

12. Smith was again scheduled to work on Sunday, August 15, 1982. Once again he informed his supervisor that he would be absent from work due to his religious convictions and once again he called the office on Sunday morning to say that he would not be reporting for work since he was going to church. Smith was given a second unexcused absence.

13. After his second unexcused absence, Smith talked with his immediate supervisor, David Dunbar, who in turn talked to the Mine Superintendent, Don Ramsey, who said the unexcused absences would stand. Mr. Dunbar also promised to ask his son if he would swap with Smith but no swap was arranged.

14. After his second unexcused absence, Smith also asked two other mechanics if they would swap with him and both declined. Smith then decided that it was wrong for him, personally, to ask someone to swap with him, since he was in effect, asking that person to sin. However, Smith would have worked in a company arranged swap.

15. Other than Dunbar's promise to ask his son if he would swap with Smith, *Pyro* Management *never took any affirmative actions* to assist or offered to assist Smith in arranging shift trades.

16. After Smith's second unexcused absence, the Mine Manager, Danny Griffin, talked with Smith about his absences and was told by Smith that he did not believe in working on Sundays. Griffin told Smith to try and arrange a swap and to come back if nothing could be worked out. Griffin was aware that Smith considered it to be wrong to ask someone to work for him, but he could not recall whether Smith had told him this or that he had just heard it somewhere.

17. Smith was again scheduled to work on Sunday, August 22, 1982, and once again he notified his supervisor that he would not be reporting to work and once again he called into the office on Sunday morning.

18. Pyro had a company policy that when an employee had accumulated three unexcused absences within a six-month period then that employee was automatically terminated. In accordance with this policy, Smith was discharged on Monday, August 23, 1982, when he reported to work after his third unexcused Sunday absence.

19. On the day of his discharge, Smith appealed his termination to Mine Superintendent Varney Coleman. At this time Smith proposed that the company allow him to work additional days in excess of the regular shift without overtime pay to make up for the Sunday absences. He also proposed that he be transferred to a "surface job" which would not have required Sunday work. These requests were refused by Pyro.

20. At the time of his discharge Coleman told Smith that he would look into it and see if anything could be done. Coleman then turned the matter over to the Assistant Manager of Employee relations, Paul Bruce Hill, who conducted only a cursory examination that appeared to be designed solely to backup management's decision to terminate Smith.

21. Smith's work performance record while in Pyro's employ was very good to excellent. If it had not been for Smith's three unexcused Sunday absences, then he would still in all probability be employed by Pyro today.

22. To date Pyro management is aware of only two instances in which Sabbatarians have had a conflict with the Sunday work schedule.

23. The parties have stipulated that had Smith remained in Pyro's employ his compensation and benefits from August 23, 1982, through August 21, 1985, would have totaled $92,272.82. The amounts earned by Smith from unemployment compensation and from his current employer during that same period total $57,808.38. Therefore, the amount of Smith's damages are $34,464.48.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter pursuant to Title 42, United States Code, Section 2000e *et seq.*

2. Defendant is an employer within the meaning of Title 42, United States Code, Section 2000e *et seq.*

3. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides that it is an unlawful employment practice for an employer to dis-

charge an individual because of that individual's religion. The term "religion" is defined in Section 701(j) as including:

> . . . all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j).

4. The employer's duty to accommodate an employee's religious beliefs arises only in certain circumstances. Any employment system that is reasonably efficient is also going to entail a certain amount of discrimination when applied to a large group of individuals, particularly in a pluralistic society such as ours that has long been tolerant of differing ideas and religions. In recognition of this fact, Congress has said that bona fide seniority or merit systems, absent discriminatory intent, are not unlawful despite resulting differences in the treatment of employees. 42 U.S.C. § 2000e-2(h). Section 701(j), 42 U.S.C. § 2000e(j) was added by the Senate in 1972 partially in response to *Dewey v. Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), to make it clear that an employer could not rely solely on the imposition of a neutral seniority system, but must make reasonable accommodations for the religious needs of its employees. *Trans World Airlines v. Hardison*, 432 U.S. 63, 74, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) (Footnote 9). As a practical matter, the employer cannot be required to anticipate and design a system that is capable of accommodating all possible religious beliefs, therefore, most post-*Hardison* courts have adopted a three-fold test that the plaintiff must prove to

establish a prima facie case of religious discrimination. Under this test Smith has the burden of pleading and proving that (a) he had a bona fide belief that working on the Sabbath was contrary to his religious faith; (b) he sufficiently informed his employer about his religious views and the conflict they created; and (c) he was discharged because of his refusal to work on the Sabbath. *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 454 U.S. 1145, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979); *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979); *EEOC v. Caribe Hilton Int'l*, 36 F.E.P. 420, 422-423 (D.P.R. 1984); *Wangsness v. Watertown School Dist. No. 14-4, Etc.*, 541 F.Supp. 332, 335 (D.S.Dk. 1982); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 405 (9th Cir. 1978) *cert. denied* 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979); *Redmon v. GAF Corporation*, 574 F.2d 897, 902 (7th Cir. 1978). The plaintiff has established his prima facie case. Smith appeared to this Court to be sincere in his religious beliefs. There was no evidence introduced to show that Smith was engaged in anything other than religious activities on the Sundays he was absent. Smith was acknowledged to be a good worker and it does not appear that he used his religious convictions to excuse general shortcomings. The only serious attack on Smith's sincerity was made when the defendant pointed out that Smith had previously worked the last hour of the Sabbath while on the third shift. Smith testified that he did so because by 11:00 P.M. on Sunday night, all Church Services had long been concluded and for all intents and purposes, the Sabbath was over. At the very worst this is ambiguous. Certainly it is understandable. Smith also adequately informed Pyro management of his religious convictions and the conflict that they

created. Smith told Mine Superintendent, Varney Coleman, both prior to being hired and on the day he was fired that he did not believe in working on Sundays. He also notified his immediate supervisor, David Dunbar, of his religious convictions prior to each absence and Mine Manager, Danny Griffin, and Mine Superintendent, Don Ramsey, both became aware of Smith's plight after his second unexcused absence and before his final termination. Finally, while Pyro contends that Smith was not fired because of his religious convictions but was fired because of three unexcused absences it is quite clear that the unexcused absences were the result of his religious convictions.

5. The burden then effectively shifted to the employer, Pyro, to show (a) that a good faith effort was made to accommodate Smith's beliefs and that those efforts were unsuccessful; and/or (b) Pyro was unable to reasonably accommodate Smith without incurring undue hardship. *McDaniel v. Essex International, Inc.*, 509 F. Supp. 1055, 1058 (W. D. Mich. 1981), *on remand from* 571 F.2d 338 (6th Cir. 1978), *aff'd.*, 696 F.2d 34 (6th Cir. 1982); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d at 401; *EEOC v. Caribe Hilton Int'l*, 36 F.E.P. at 422-423; *Wangsness v. Watertown School Dist. No. 14-4, Etc.*, 441 F.Supp at 335; *Burns v. Southern Pacific Transportation Co.*, 589 F.2d at 405; ***Redmon v. GAF Corporation,*** 574 F.2d at 901. The closest Pyro came to an affirmative attempt to accommodate Smith's beliefs occurred when David Dunbar promised to ask his son if he would swap shifts with Smith.

The defendant contends that its publicized consent to shift swapping supplemented by the "open door policy" were sufficient to satisfy its duty to accommodate Smith's

beliefs. It would have the court hold that a general system that is flexible and allows an employee to accommodate himself is sufficient to satisfy the employer's duty. Pyro would cast the burden on the employee to exhaustively seek an accommodation by extensively searching for a swap or by pursuing a resolution of the conflict through various stages of company management until the president of the company was reached. In support Pyro relies on cases emphasizing the mutuality of obligation on the employee's part. *See Chrysler Corporation v. Mann,* 561 F.2d 1282 (8th Cir. 1977) *cert. denied,* 434 U.S. 1039, 98 S.Ct. 778, 54 L.Ed.2d 788 (1978); *Settles v. Wickes Lumber Division,* 23 E.P.D. ¶ 31,082 (6th Cir. 1980); *Brener v. Diagnostic Center Hospital,* 671 F.2d 141 (5th Cir. 1982); *Jordan v. North Carolina National Bank,* 565 F.2d 72 (4th Cir. 1977). The defendant would characterize Smith as an uncooperative employee since after initially failing to find a swap, Smith came to the revelation that he was asking someone else to sin for him and decided he should not ask anymore. Smith, however, by going to work without assurances he never would be required to work on Sundays would have satisfied the court in *Jordan v. North Carolina National Bank,* since that court would only ask the employee to work until it was time to "cross that bridge" when an actual conflict arose. 565 F.2d at 76. Neither is Smith like the employee in *Chrysler Corporation v. Mann,* who refused to use his paid leaves of absences for religious holidays. 561 F.2d at 1284. The case most favorable to the defendant is *Brener v. Diagnostic Hospital.* In that case the employee failed to fully explore the employer's flexible scheduling system before seeking additional action from the hospital. The employer, however, had already

violated its own policy by asking other employees to swap with the plaintiff and the plaintiff seemed to be trying to take advantage of the system. Furthermore, it should be noted that in *Brener* the employee was highly educated and on an equal footing with the management. If reasonable accommodation is a factual determination to be made in light of the particular circumstances of each case, *Redmon v. GAF Corporation,* 574 F.2d at 902-903, then the sophistication and education of the employee must be considered to determine whether the employee and the employer acted reasonably. This Court is of the opinion that the correct rule of law was stated in *Redmon* as follows:

> *Chrysler Corporation v. Mann,* 561 F.2d 1282 (8th Cir. 1977), also cited by defendant states that the plaintiff also has a duty "to attempt to accommodate his beliefs himself." This duty is found not in Title VII, but rather in the "mutuality of obligation [which] inheres in the employer-employee relationship" apart from the Act. *Id.* at 1285. We agree that the concept of a "mutuality of obligation" is inherent in accommodation, for rarely will an accommodation be successful without mutual efforts and cooperation. However, to the extent that the *Chrysler* court may be interpreted to say that it is incumbent on plaintiff to show first that he has made some effort to either "compromise" or accommodate his own religious beliefs before he can seek accommodation from his employer, we disagree.[13]
>
> We believe that when the court in *Chrysler* was suggesting was that when "procedures and scheduling already provide a measure of elasticity in switching work shifts and in allowing excused absences," a plaintiff's failure to first seek an accommodation within these procedures indicates a lack of cooperation which, when combined with other factors, may render an accommodation impossible. (Footnote 13).
>
> 574 F.2d at 901-02.

Indeed it was Pyro that adopted an intransigent position.

The defendant would also contend that the implementation of a neutral seniority system satisfied its duty of accommodation. The Supreme Court in *Trans World Airlines v. Hardison, supra,* did call the seniority system a "significant accommodation" 432 U.S. at 78. However, the reason the Court discussed the seniority system so extensively in the *Hardison* case was to show that a reasonable accommodation did not require a breach of the system. Even the Sixth Circuit case of *Dewey v. Reynolds Metals Company, supra,* was decided with two judges in dissent and was affirmed by an equally split Supreme Court prior to the 1972 amendments to the Act and the dissent of Circuit Judge Combs seems to typify the position taken by most post-*Hardison* courts.

6. Although there are "no exact parameters" defining what constitutes reasonable accommodation, *EEOC v. Caribe Hilton Int'l,* 36 F.E.P. at 423, the Supreme Court in *Trans World Airlines v. Hardison, supra,* established guidelines to analyze whether an employer has satisfied its duty of reasonable accommodation that are applicable to this case.

7. In *Hardison,* the employer did four things to satisfy its duty to accommodate the employee. First, it held meetings with the employee in an attempt to find a solution. Second, it accommodated the employee in his observance of his special (not weekly) religious holidays. Third, it authorized the union steward to search for someone who would swap shifts. Fourth, it attempted to find Hardison another job. 432 U.S. at 77. Pyro has attempted to parallel its actions to those of TWA. Pyro asserts that

its presentation of the video tape explaining the new work week and condoning shift swapping constituted meetings to resolve the problem. In *Hardison*, however, the meetings were with the employee individually and for the express purpose of discussing alternative solutions. Second, Pyro contends that it has previously accommodated Smith by not requiring him to work on Sundays for the first year of his employment. This is hardly an accommodation though since no one in Smith's classification was required to work on Sundays prior to the institution of the eight-day work week. Third, Pyro points to its publicized approval of shift swapping to solve employee conflicts. In *Hardison*, the employer authorized the union steward to search for a swap. Clearly all the actions taken by the employer in *Hardison* constituted affirmative acts directed toward the resolution of the individual employee's problem. The burden is on the employer "to make an effort at accommodation." *McDaniel v. Essex International, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978). An "effort" is never a passive thing. Most recently in *EEOC v. Caribe Hilton-Int'l*, the court said that the duty to accommodate required the employer to take "certain affirmative measures." 36 F.E.P. at 423. A non-discriminatory or neutral system is not enough once an employee's religious conflict is brought to the employer's attention. When that happens, the employer must make inquiries to determine whether there is any way in which that particular employee's conflict may be easily resolved.

8. An employer that fails to prove that reasonable efforts were made to accommodate the employee's religious beliefs must alternatively demonstrate that it could

not reasonably accommodate the employee's religious beliefs without incurring undue hardship. *McDaniel v. Essex International, Inc.*, 571 F.2d at 341. This Court finds it unnecessary to decide whether the employer must first show a good faith effort to accommodate had been made before it could proceed to raise the further defense of undue hardship since the Court has determined that Pyro has failed on both counts.

9. While the defendant gave examples of accommodations that would have comprised undue hardships, it totally failed to prove that Smith could not have *possibly* been accommodated without more than *de minimus* costs. The Supreme Court in *Trans World Airlines v. Hardison,* made it clear that an employer would not have to breach a non-discriminatory collective bargaining or seniority system, nor would it have to deny the shift and job preferences of other employees to accommodate the religious employee. 432 U.S. at 79-83. The employer does not have to bear more than a *de minimus* cost to give the employee the Sabbath day off. In *Hardison,* the *de minimus* standard as applied, meant that the employer would not have to finance the Sabbatarian's day off by paying a replacement premium wages. *Id.* at 84. The defendant correctly maintains that it would have constituted an undue hardship (a) to have replaced plaintiff on his scheduled Sunday shifts with another mechanic with contemporaneous duties, (b) to have hired a part-time replacement for such shifts, or (c) to have paid overtime to an incumbent mechanic to cover such shifts. Pyro also maintains that it would have constituted an undue hardship to have operated a shift short-handed given the need for the plaintiff's

services. Yet the defendant failed to show that Smith's absences caused a loss in efficiency or the actual incurrence of additional costs. The Sixth Circuit has taken the lead in casting a skeptical eye on hypothetical hardships. *Draper v. United States Pipe and Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1976); *McDaniel v. Essex International, Inc.*, 571 F.2d at 343; *See also Brown v. General Motors Corporation*, 601 F.2d at 960; *Burns v. Southern Pacific Transportation Company*, 589 F.2d at 406; *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). Neither is the Court convinced by defendant's argument that if it accommodates Smith then it will be deluged with requests by other employees who are presently sacrificing their religious beliefs since Varney Coleman testified that there has been only two instances where an employee's religious beliefs caused a conflict with Sunday work.

10. In the wake of *Hardison*, it is true that the employer's obligation to accommodate the employee is far from being immense. As a practical matter, a shift trade or a shift swap in most circumstances is going to be one of the few permissible types of accommodation. But *Hardison* did not make Section 701(j) a complete nullity. The employer still has the affirmative duty to "reasonably accommodate" an employee's religious observances. It was the testimony at trial that there were twenty men that could have swapped with the plaintiff. The company had a monthly newspaper that was distributed to the men. Bulletin boards were available in the bathhouses and in the mine offices and the employee handbook admonished the men to read and scan these boards daily for important

notices. The company had a personnel department. Surely there would have been no undue hardship to the company had it simply posted a notice on the bulletin boards or in the company paper that the company was looking for someone willing to swap shifts with the plaintiff. It was apparent to this Court that from the testimony and demeanor of the defendant's witnesses at trial that Pyro had no real desire to accommodate Smith's religious beliefs and flat out refused to lend him any significant assistance.

11. Based on the foregoing, the Court concludes that as a matter of law, the defendant had made no effort to reasonably accommodate plaintiff's religious beliefs, nor has defendant shown any inconvenience or "undue hardship" to justify its failure to accommodate plaintiff. Thus, plaintiff is entitled to judgment over and against defendant in an amount equal to the difference between the gross back pay he would have received between August 23, 1982, and August 21, 1985, and his interim earnings. This amount has been stipulated by the parties to total $34,464.48.

12. In his complaint, and in passing in closing argument, plaintiff also asked for reinstatement to his former position. Reinstatement is not mandatory, but is an equitable remedy committed to the discretion of the Court. *E.E.O.C. v. Kallir, Phillips, Ross, Inc.*, 420 F. Supp. 919, 926 (S.D.N.Y. 1976), *aff'd without pub. op.*, 559 F.2d 1203, *cert. denied*, 434 U.S. 920, 98 S.Ct. 395, 54 L.Ed.2d 277 (1977). It is to be denied "only for reasons which if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the

economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). In considering reinstatement the Court should balance the interests and assess the impact it would have on other non-victim employees and their expectations and it has been denied where it would necessitate the dismissal of other employees; *Wangsness v. Watertown*, 541 F.Supp. at 339; or where it would result in an unworkable situation due to animosity generated in the course of lengthy litigation. *E.E.O.C. v. Kallir*, 420 F.Supp. at 926-27. Having observed the parties during trial, given the long lapse of time since Smith was fired, and considering the nature of underground coal mining workforce, this Court is of the opinion that reinstatement would not serve any useful purpose.

An appropriate Order has been entered as of this date.

Dated this 22 day of October, 1985.

/s/ Ronald E. Meredith
RONALD E. MEREDITH
JUDGE, U. S. DISTRICT COURT

cc: Counsel of Record

(Entered October 22, 1985)

APPENDIX 2

No. 85-6063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANNY R. SMITH, Plaintiff-Appellee,	)	On Appeal from the United States District Court for the Western District of Kentucky.
v.	)	
PYRO MINING COMPANY, Defendant-Appellant.	)	

Decided and Filed September 1, 1987

Before: ENGEL, JONES, and KRUPANSKY, Circuit Judges.

JONES, Circuit Judge, delivered the opinion of the court, in which ENGEL, Circuit Judge, joined. KRUPANSKY, Circuit Judge, (pp. 17-36) delivered a separate dissenting opinion.

JONES, Circuit Judge. The defendant in this employment discrimination case appeals from a judgment awarding damages to the plaintiff for discrimination on the basis of religion in violation of Title VII, 42 U.S.C. § 2000e2(a)(1) (1982). Because we find no error in the district court's disposition of this case, we affirm.

The plaintiff, Danny R. Smith, was hired by Pyro Mining Company on June 19, 1981, as a mechanic in an underground coal mine. Pyro employs over 1,000 persons who work underground and another 150 surface employees. During the time of his employment at Pyro, Smith was a member of the Independent General Baptist Church located in Cedar Hill, Kentucky. Smith also held the church offices of Treasurer and Trustee at the time. He subsequently became a Sunday School teacher. The official doctrine of the church precluded all officers and teachers in the church from working on Sundays, although individuals could work on Sunday and remain church members. Based on the teachings of his church, Smith believed that it was morally wrong to work on Sundays in the absence of a life threatening situation.

During his initial employment interview, Smith informed Varney Coleman, Mine Superintendent for Pyro, that he had religious convictions against working on Sundays. Despite his convictions, Smith worked for a time on Pyro's third shift, which required him to report for work at 11:00 p.m. on Sundays. Aside from these occasions, Smith was not required to work on Sundays during the first year of his employment.

On July 11, 1982, Pyro altered its work schedule and implemented an eight-day work week for employees stationed at the mine where Smith worked. The eight-day work week was instituted to improve mining efficiency. Under the new schedule, employees were assigned to work four consecutive ten-hour days and then have four consecutive days off. Each employee was required to work approximately twenty-six Sundays per year.

Prior to implementing the new schedule, Pyro publicized through a video presentation its policy of allowing employees who objected to working on Sundays to trade scheduled shifts with another qualified employee who was not scheduled to work the same shift.[1] Pyro also had a representative on hand to answer questions following the presentations. Under Pyro's policy of attempting to accommodate those unable to work on Sundays due to religious reasons, an employee was first required to attempt to arrange a shift swap with another qualified employee. If the employee was unsuccessful in that effort, he was then required to exhaust the opportunities afforded by Pyro's "Open Door Policy" to resolve the problem. The "Open Door Policy" was designed to allow an employee who had a work-related grievance or other problem to personally present the matter first to his supervisor and then up the chain of command to the president of Pyro, if necessary, to resolve the problem. All employees were given a handbook setting forth this policy prior to the implementation of the eight-day work week.

Smith was scheduled to work on the first Sunday that the new schedule went into effect. All employees

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[1]The district court described the video presentation in the following manner. "Prior to the implementation of the eight-day work week, Pyro, through crude language and a format that had to be an insult to the intelligence of the great majority of those who viewed it, publicized its policy of allowing employees who objected to Sabbath work to trade shifts with other qualified employees. The sum of this publication consisted of quick references toward the end of the video between two persons portraying miners. The crux of the exchange comes when the miners are discussing the new eight-day week and Sunday work. One employee asked, 'What about preachers?' The other one replies, 'Hell, if they let us swap off to go fishing, I reckon they'll let the preachers swap off.'" App. at 189.

were required to report to work on that Sunday, July 11, 1982. The entire company had been on a two-week vacation and prior to the vacation, Smith had informer his immediate supervisor, David Dunbar, that he would not be reporting for work on Sunday, July 11, 1982, due to his religious convictions. Smith called the office on Sunday and left word that he would not be reporting to work since he was going to church. He was subsequently given an unexcused absence for missing work that day.

Smith was again scheduled to work on Sunday, August 15, 1982. Once again he informed his supervisor that he would be absent from work due to his religious convictions. He was given a second unexcused absence. After his second unexcused absence, Smith talked with David Dunbar, who in turn talked to mine superintendent Don Ramsey, who said that the unexcused absences would stand. Dunbar promised Smith that he would ask his son to swap work days with Smith, but this swap never took place. Smith also asked two other mechanics if they would swap with him and both declined. Smith then decided that it was wrong for him personally to ask someone to swap with him since he was, in effect, asking that person to sin. Smith, however, was willing to work in a swap arranged by the company.

After Smith's second unexcused absence, the Mine Manager, Danny Griffin, talked with him about his absences and was told by Smith that he did not believe in working on Sundays. Griffin told Smith to try and arrange a swap and to come back if nothing could be worked out. Griffin was aware that Smith considered it to be morally wrong to ask someone to work for him on a Sunday.

Smith was again scheduled to work on Sunday, August 22, 1982. He again notified his supervisor that he would not be reporting to work. He was given a third unexcused absence for missing work. Pyro had a company policy of automatically terminating any employee who accumulated three unexcused absences within a six-month period. In accordance with this policy, Smith was discharged on Monday, August 23, 1982, when he reported to work after his third unexcused Sunday absence.

On the day of his discharge, Smith appealed his termination to Coleman. At this time Smith proposed that the company allow him to work additional days in excess of the regular shift without overtime pay to make up for the Sunday absences. He also proposed that he be transferred to a surface job that did not require Sunday work. Both requests were refused by Pyro. At the time of the discharge, Coleman told Smith that he would look into the matter to see if anything could be done. Coleman subsequently turned the matter over to the Assistant Manager of Employee Relations, Paul Hill. Hill conducted a cursory examination of the matter and concluded that Smith had been properly terminated.

Following his discharge, Smith filed a complaint against Pyro in federal district court alleging that Pyro had violated the religious discrimination provisions of Title VII by discharging him because of his religious beliefs. Pyro's answer denied Smith's allegations and claimed that Smith had refused to cooperate with Pyro's effort to accommodate his religious needs. Following a one day bench trial, the district court entered judgment for Smith, finding that Pyro had made no effort to reasonably accommodate his religious beliefs. The court fur-

ther found that Pyro had not shown any undue hardship to justify its failure to accommodate Smith. On appeal Pyro challenges the following findings of the district court: (1) that Smith's religious beliefs were sincerely held; (2) that Pyro failed to reasonably accommodate Smith's religious beliefs; and (3) that Pyro failed to establish that accommodation would pose an undue hardship.

I.

Title VII provides in part that "[i]t shall be an unlawful employment practice for an employer (1) to . . . discharge any individual . . . because of such individual's . . . religion . . . ." 42 U.S.C. § 2000e-2(a)(1) (1982). When Congress amended Title VII in 1972, it added the following definition of religion:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employees' . . . religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j)(1982). "The intent and effect of this . . . was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of its employees and prospective employees." *TWA v. Hardison*, 432 U.S. 63, 74 (1977). The obligation to accommodate includes efforts to accommodate those employees who refuse to work on particular days of the week because of their religious beliefs. *See, e.g., Murphy v. Edge Memorial Hospital*, 550 F. Supp. 1185 (M.D. Ala. 1982). "[A]ny reasonable accommodation by the employ-

er is sufficient to meet its accommodation obligation." *Ansonia Bd. of Educ. v. Philbrook,* 107 S. Ct. 367, 372 (1986). "[W]here the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." *Id.*

The analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination. Such a case is established when an employee shows that: (1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflicts; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement. *Turpen v. Missouri-Kansas-Texas R.R. Co.,* 736 F.2d 1022, 1026 (5th Cir. 1984). Once the employee has established a prima facie case, the burden shifts to the employer to prove that it cannot reasonably accommodate the employee without incurring undue hardship. *See, e.g., id., Anderson v. General Dynamics Convair Aerospace Division,* 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979).

Although the burden is on the employer to accommodate the employee's religious needs, the employee must make some effort to cooperate with an employer's attempt at accommodation.

> An employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for accommodation to his em-

> ployer. Where an employee refuses to attempt to accommodate his own beliefs or to cooperate with his employer's attempt to reach a reasonable accommodation, he may render an accommodation impossible.

Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978). *See also Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-46 (5th Cir. 1982) ("bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business").

The reasonableness of an employer's attempt at accommodation cannot be determined in a vacuum. Instead, it must be determined on a case-by-case basis; what may be a reasonable accommodation for one employee may not be reasonable for another. In *Redmond v. GAF Corp.*, 574 F.2d 897, 902-03 (7th Cir. 1978), the Seventh Circuit noted that:

> The term "reasonable accommodation" is a relative term and cannot be given a hard and fast meaning. Each case involving such a determination necessarily depends upon its own facts and circumstances, and comes down to a determination of "reasonableness" under the unique circumstances of the individual employer-employee relationship. The trier of fact is in the best position to weigh these considerations.

Accord United States v. Albuquerque, 545 F.2d 110, 114 (10th Cir. 1976). If the employer's efforts fail to eliminate the employee's religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employee's religious beliefs without incurring undue hardship. *American Postal Workers Union*

v. Postmaster General, 781 F.2d 772, 776 (9th Cir. 1986); *McDaniel v. Essex Intern., Inc.*, 571 F.2d 338, 341 (6th Cir. 1978). This court has noted that:

> [A]n employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine. In addition, we are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted.

Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975). An employer may nonetheless establish undue hardship without actually putting an accommodation into effect. *Id.* An employer must still, however, present evidence of undue hardship; it cannot rely merely on speculation. *See e.g., Brown v. General Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979). With this legal framework in mind, we turn to an analysis of Pyro's claims of error.

II.

The first issue we address is whether Smith established a prima facie case of discrimination. The necessary elements of Smith's prima facie case are that: (1) he had a sincere belief that working on Sunday was contrary to his religious beliefs; (2) he informed Pyro about his religious beliefs and the conflict they created with his job; and (3) he was discharged because of his refusal to work on Sundays. After reviewing the evidence, the district

court concluded that Smith had established a prima facie case.

On appeal Pyro's challenge focuses on the first element of Smith's prima facie case; there is no dispute about the other elements. Pyro argues that since Smith had at one point worked from 11:00 p.m. to 12:00 a.m. on Sunday while he was on the third shift, his belief that it was morally wrong to work on Sundays was not sincerely held. The district court considered this fact in its opinion and concluded that it did not detract from Smith's sincerity.

A district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." Fed. R. Civ. P. 52(a). Factual findings will be deemed clearly erroneous on review only if, after reviewing the entire record, the appellate court is left with the definite and firm conviction that a mistake has been made. *Anderson v. Bessemer City,* 105 S.Ct. 1504, 1511 (1985). Additionally, when, as was the case here, "findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 1512.

Under this standard, we are easily convinced that the district court's findings were not clearly erroneous. Smith testified at great length about his commitment to his religion. He also testified that the reason he went to work on the last hour of some Sundays was because by 11:00

p.m. on Sunday night, all church services had been concluded and, for all intents and purposes, the Sabbath was over. There is little doubt but that Smith was heavily involved with his church; he served as both an officer and a Sunday School teacher. Finally, no evidence was introduced by Pyro to show that Smith was engaged in anything other than religious activities on the Sundays he was absent from work. Accordingly, we reject Pyro's challenge to the prima facie determination.

III.

Having found that Smith established a prima facie case of discrimination, our analysis now shifts to the question of whether Pyro reasonably accommodated Smith's religious beliefs as required by 42 U.S.C. § 2000e (j)(1982). Pyro argued before the district court that its consent to shift swapping, supplemented by its "Open Door Policy," was sufficient to satisfy its duty to reasonably accommodate Smith's religious beliefs. The district court rejected this assertion and held, in effect, that Pyro had to make an affirmative effort to reasonably accommodate Smith by arranging a swap for him. On appeal Pyro argues that the trial court's conclusion that Title VII required it to solicit replacements for Smith is reversible error. Pyro contends that since it allowed its employees to trade shifts it thereby satisfied its obligations under Title VII. In Pyro's view, Smith's refusal to personally solicit a replacement constituted a failure on his part to cooperate with its efforts to accommodate him.

In *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689

(1971),[2] this court held that an employer did not violate Title VII by discharging an employee who refused to work on Sunday and also refused to arrange a shift swap on the grounds that to do so would have been a sin. The court concluded that to accede to Dewey's demands that he neither be required to work on Sundays nor find a replacement would require the employer to impermissibly discriminate against other employees.[3]

The facts of *Dewey* and the instant care are quite similar, and at first glance it would appear that, as Pyro suggests, *Dewey* should control the disposition of this appeal. However, we believe that there is good reason for us not to follow *Dewey* in this instance. *Dewey* was decided by this court in 1970 and affirmed by a divided Supreme Court the following year. In 1972, Congress amended Title VII, and added subsection (j), which provides that employers must attempt to reasonably accommodate the religious needs of their employees, absent undue hardship. Prior to the enactment of this subsection, Title VII itself contained no requirement that employers make such an attempt. Title VII, as enacted in 1964, prohibited religious discrimination in employment, but went no further. The question of the necessity for accommodation was left to the Equal Employment Opportunity Commission. In its original regulations the EEOC

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[2]An affirmance by an equally divided court is not entitled to precedential weight. *Neil v. Biggers,* 409 U.S. 188, 192 (1972).

[3]Judge Combs filed a strong dissent in which he noted that Dewey's refusal to seek a replacement himself "was grounded in his belief that working on Sunday is inherently wrong and that it would be a sin for him to induce another to work in his place. The replacement system was therefore no solution to Dewey's problem." 429 F.2d at 333.

stated that an employer had an obligation to accommodate the religious practices of its employees unless such an accommodation would create "a serious inconvenience to the conduct of the business." 29 C.F.R. § 1605.1(a)(2) (1967). However, the regulations also allowed an employer to adopt any work week schedule generally applicable to all employees, without regard to or accommodation of an employee's religious needs. *Id.* §§ 1605.1(a)(3), (b)(3). The EEOC subsequently revised these regulations and stated that Title VII included "an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees. . . where such an accommodation can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. §§ 1605.1(b), (c)) (1968).[4]

Some courts, including this one, were doubtful about whether the EEOC's interpretation of Title VII's requirements with regard to accommodation comported with Congress' intent.[5] However, when Congress amended Title

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[4]Although the *Dewey* panel did consider this regulation in its opinion, it strongly indicated its belief that the regulation was unauthorized by Congress:

> It should be observed that it is regulation 1605.1(b) and not the statute § 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.

429 F.2d at 331 n.1 (emphasis in original).

[5]In denying a petition for rehearing en banc in *Dewey*, the panel wrote that:

(Continued on following page)

VII in 1972, it added the reasonable accommodation requirement, thereby explicitly adopting the EEOC's interpretation of Title VII.[6] Following the 1972 amendment, courts could no longer dispute that Title VII mandated reasonable accommodation. *See Hardison*, 432 U.S. at 74. Therefore, given the significant change in the law since

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(Continued from previous page)

> Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.
>
> . . . .
>
> To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment.

429 F.2d at 334. Clearly, the panel was of the view that to require an employer to accommodate the religious needs of its employeees would be contrary to the law. However, reasonable accommodation is now precisely what the law requires. As Justice White noted in writing for the majority in *Hardison*, "[c]learly, any suggestion in *Dewey* that an employer may not be required to make *reasonable* accommodation for the religious needs of its employees was disapproved by § 701(j). . . ." 432 U.S. at 75 n.9 (emphasis in original).

[6]Some courts have expressed the view that the 1972 amendment defining religion was added as a direct response to this court's decision in *Dewey*. *See Cooper v. General Dynamics*, 533 F.2d 163, 167 (5th Cir. 1976); *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116-17 (5th Cir. 1972) (discussing legislative history of the amendment). The relevant legislative history supports this conclusion. *See* 118 Cong. Rec., §§ 727-53 (1972).

our decision in *Dewey* we consider the issue now before us anew.[7]

Undoubtedly, one means of accommodating an employee who is unable to work on a particular day due to religious convictions is to allow the employee to trade work shifts with another qualified employee. Other circuits have held that when an employer allows such a trade, it has reasonably accommodated its employee. *See, e.g., Brener*, 671 F.2d at 146; *Albuquerque*, 545 F.2d at 114. Pyro urges us to follow *Brener* and *Albuquerque* and hold that its policy of allowing its employees to trade shifts was a reasonable accommodation of Smith's religious beliefs. We declined to do so because the instant case is readily distinguishable from *Brener* and *Albuquerque*. Neither of the employees in those cases had any religious objection to arranging a shift swap for himself. In the instant case, however, Smith clearly believes that it would be a sin to ask someone to work for him on Sunday. Therefore, the

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[7]The dissent contends that the majority opinion "summarily overrules the precedent of *Dewey*" and ignores this circuit's tradition that reported panel opinions are binding upon subsequent panels. We disagree with these characterizations of the majority opinion. We neither overrule binding precedent nor ignore circuit tradition. The binding effect of *Dewey* was undermined by Congress, not by this panel. As a court of law we are bound to interpret and apply the law that exists when we decide a case. When intervening changes in the law have proved prior precedent to be incorrect, a subsequent panel is not bound to continue following the disapproved precedent. Such blind allegience is both unwise and unwarranted.

Congress has spoken, and in doing so it has signalled that our decision in *Dewey* seventeen years ago is no longer good law. We are bound to follow the dictates of Congress. We do not overrule binding precedent in doing so. Instead, we merely revisit the issue considered in *Dewey* and resolve it in accordance with current law.

question now before us is whether an employer reasonably accommodates an employee by allowing the employee to arrange a shift trade himself when the employee considers it a sin to arrange such a swap.

We think it clear that if Smith had no religious qualms about asking others to work the Sundays he was scheduled to work, then Pyro's proposed accommodation would have been reasonable. However, where an employee sincerely believes that working on Sunday is morally wrong and that it is a sin to try to induce another to work in his stead, then an employer's attempt at accommodation that requires the employee to seek his own replacement is not reasonable. We therefore agree with the district court that Pyro has not met its obligation under Title VII.[8]. Since the accommodation proposed originally by Pyro was not reasonable, Pyro was obligated to make further attempts at accommodating Smith, unless such attempts would pose an undue hardship.[9] We now turn to the question of

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[8]We note parenthetically that Pyro obviously did not attempt a reasonable accommodation of Smith's religious beliefs on the first Sunday of its new schedule because *all* employees were required to report to work on that day. Therefore, a shift swap would have been difficult or impossible to arrange.

[9]Contrary to the assertion in the dissent, the majority opinion does not impose the entire burden of accommodation on the employer. A cursory examination of the majority opinion clearly indicates that it is entirely in tune with current law which requires the employee to bear some of the burden of accommodation. Nowhere do we suggest that the entire burden of accommodation may be placed on the employer. Indeed, we agree with the dissent's statement that "it is well established that an employee is not invested with an absolute right to demand an accommodation on his own terms." All that the law allows an employee to demand is a *reasonable* accommodation.

whether alternate attempts at accommodating Smith would have constituted undue hardship for Pyro.[10]

IV.

In the district court, Pyro argued that any further attempt at accommodating Smith beyond allowing him to arrange a shift swap would present undue hardship. The court rejected this claim and found that arranging a shift swap for Smith would not have constituted undue hardship for Pyro. The court concluded that:

> It was the testimony at trial that there were twenty men that could have swapped with the plaintiff. The company had a monthly newspaper that was distributed to the men. Bulletin boards were available in the bathhouses and in the mine offices and the employer handbook admonished the men to read and scan these boards daily for important notices. The company had a personnel department. Surely there would have been no undue hardship to the company had it simply posted a notice on the bulletin boards or in the company paper that the company was looking for someone willing to swap shifts with the plaintiff. It was apparent to this Court that from the testimony and demeanor of the defendant's witnesses at trial that Pyro had no real desire to accommodate Smith's religious beliefs and flat out refused to lend him any significant assistance.

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[10]The dissent claims that our consideration of this issue is misconceived. This contention would be accurate only if Pyro had attempted to reasonably accommodate Smith's religious beliefs. The Supreme Court has noted that "the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship." *Philbrook*, 107 S. Ct. at 372. The record supports the district court's finding that Pyro did not offer Smith a reasonable accommodation. Consequently, the issue of undue hardship is properly joined.

App. at 204. On appeal Pyro asserts that the district court's conclusion that it failed to establish undue hardship is clearly erroneous. We disagree. We find it difficult to see why soliciting replacements for Smith would have been an undue hardship for Pyro. The record indicates that prior to switching to the new eight-day work week, Pyro had a policy of communicating or advertising the fact that an employee needed to trade shifts, and the company took an active role in contacting employees to participate in shift trades. Pyro had the mechanism in place for soliciting replacements—namely the monthly newspaper and the bulletin boards. Pyro could have reasonably accommodated Smith by simply placing a notice in the newspaper or on a bulletin board that a replacement was needed for him. Pyro failed to meet its burden of establishing that such an accommodation of Smith's religious convictions would be an undue hardship.[11]

V.

For the reasons set forth in this opinion, the judgment of the district court is AFFIRMED.

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[11]Because we conclude that by attempting to arrange a shift swap for Smith Pyro would have reasonably accommodated his religious needs without incurring undue hardship, we need not decide whether other means of accommodation, such as transferring Smith to a surface job, running the Sunday shifts he was scheduled to work shorthanded, or allowing him to work additional days in excess of his regular shift without overtime pay to make up the Sunday absences, would pose undue hardship. We do note, however, that the Supreme Court in *Philbrook* explicitly states that any reasonable accommodation satisfies an employer's obligation. 107 S.Ct. at 372. Thus, an employer faced with more than one means of reasonably accommodating an employee is free to choose amongst these means and select the one that poses the least hardship.

KRUPANSKY, Circuit Judge, dissenting. This circuit decided this case on July 30, 1970 under the style of *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970). It denied rehearing en banc on August 11, 1970 and the Supreme Court affirmed the decision by an equally divided court during its October term of the same year.[1] *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971). The law of the case in *Dewey* is, accordingly, existing precedent in this circuit.

The *Dewey* court, like the instant court, was confronted with a religious discrimination charge arising as a result of Dewey's refusal to work on his Sabbath, coupled with his refusal to arrange for an authorized replacement because he perceived his effort to induce another to work in his stead as a sin. The *Dewey* court, in considering the plaintiff's refusal to work on his Sabbath, and his refusal to seek a replacement because it constituted a sin concluded in clear and concise language that the employer had satisfied its duty of "reasonable accommodation to the religious needs of its employees when it permitted Dewey, by the replacement system, to observe Sunday as his Sabbath." *Dewey*, 429 F.2d at 331.

The majority disposition summarily overrules the precedent of *Dewey* for the following reasons:

1. Congress amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. g 2000 *et. seq.* (Title VII or Act) in 1972, and added subsection 701(j), 42 U.S.C. 2000e(j), which provides that employers

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[1]Although the judgment entered by an equally divided Supreme Court in *Dewey* is not "entitled to precedential weight" in other circuits, it is, nevertheless, significant precedent within this circuit.

must attempt to reasonably accommodate the religious needs of their employees, absent undue hardship; and

2. Prior to the enactment of subsection 701(j), Title VII, as enacted in 1964, imposed no requirement upon an employer to accommodate the religious needs of its employees. *See* slip op. at 9-10.

Because it is the tradition of this circuit that reported panel opinions are binding upon subsequent panels and all issues decided therein become the law of the circuit and may not be overruled by another panel, because the resolution of the majority directly conflicts with the prior existing Sixth Circuit precedent enunciated in *Dewey*, because the majority rationalizes its definition of religious belief within a purely subjective environment, and because the *entire burden* of reasonably accommodating every religious preference of its employees in a manner prescribed by or acceptable to the employee, I must respectfully dissent.

The continuing viability of *Dewey* as legal precedent within this circuit is memorialized in its explicit reasoning and uncomplicated conclusions. A review of *Dewey* discloses that the charged religious discrimination occurred on September 11 of 1966, at which time, Title VII imposed no duty upon an employer to reasonably accommodate the religious needs of its employees absent undue hardship. At the time of the events reported in *Dewey*, § 703(a)(1) of the Act, in broad and general terms, made it unlawful for employers to discriminate against employees on the basis of religion. Implementation of the congressional mandate had been delegated to the Equal Employment Opportunity Commission (EEOC) through its rulemaking authority.

The EEOC guidelines in effect at the time of Dewey's charged discrimination provided in pertinent parts as follows:

> Section 1605.1 Observance of Sabbath and religious holidays.—(a) (1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.
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> (2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.
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> * * * *
>
> (3)(b)(3) The employer may prescribe the normal workweek and foreseeable overtime requirements, and absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

29 C.F.R. § 1605.1 (a)(1), (2) (3)(b)(3) (effective June 15, 1955).

Effective July 10, 1967, the EEOC guidelines were amended by eliminating subsection (3)(b)(3) in its entirety and by revising subsection (2) to read:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

29 C.F.R. § 1605.1(b) (1967).[2]

It is apparent that the substance of subsection (b) of 29 C.F.R. § 1605.1 as amended in 1967 was identical to subsection (2) of 29 C.F.R. 1602.2 of the original 1966 guideline. The thrust of both the 1966 and 1967 guidelines was and continues to be the obligation of the employer to accommodate the religious needs of its employees where such accommodations could or can be accomplished without undue hardship on the conduct of the employer's business.

In June of 1969 the *Dewey* trial court, having ignored the 1966 EEOC guidelines in effect on September 11, 1966, the date of Dewey's discharge, entered judgment in his favor after retroactively applying the 1967 amendment.

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[2]There is some confusion in the citations to the EEOC guidelines and their respective effective dates. In *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), and in the majority opinion, the original EEOC enactment addressing the duty of the employer to accommodate the religious convictions of its employees which became effective on June 15, 1966 has been cited as 29 C.F.R. § 1605.1 (1967); the amended version of that regulation has been cited as 29 C.F.R. § 1605.1 (1968) although its effective date was July 10, 1967. For purposes of the dissent each regulation has been cited by referring to its actual effective date.

Upon appellate review, a panel of this circuit reversed the trial court and entered judgment for the employer. Its decision noted that the 1966 EEOC Regulation § 1605.1 (a)(3) and (b)(3) had limited any obligation imposed upon the employer to accommodate the reasonable religious needs of its employees. *Dewey,* 429 F.2d at 329-30. The panel initially observed that, in its opinion, "it would have been more appropriate for the District Court to have applied the EEOC Regulation § 1605.1 which was in force at the time of Dewey's discharge, and which became effective June 15, 1966," *id.* at 329, and since the employer had provided a fair, uniform and equitable method of distributing the heavy workload among the employees without discriminating against any of them, it had not intentionally engaged in any unlawful employment practice in violation of Title VII of the Act or the EEOC guidelines. The panel thereupon proceeded to consider Dewey's right to invoke the accommodation requirements of both the 1966 and 1967 EEOC guidelines.

The panel observed that the 1967 EEOC guideline omitted § 1605.1(b)(3), in its entirety, which had provided:

> (3) The employer may prescribe the normal workweek and foreseeable overtime requirements, and absent an intent on the part of the employer to discriminate on religious grounds, *a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.*

29 C.F.R. § 1605.1(b)(3) (emphasis added).

The panel reasoned that it was undisputed by the parties that Dewey had entered the employ of Reynolds before he acquired his religious beliefs and before his employer had entered into its collective bargaining agreement which required all employees to work overtime. Accordingly, the *Dewey* panel, in the first instance, decreed that, pursuant to the 1966 EEOC guideline in force at the time of Dewey's discharge, his employer was under no obligation to accommodate his religious convictions because Dewey knew or had reason to believe that the work assignments approved by the collective bargaining agreement would conflict with his subsequently acquired religious needs.

The panel went on to decide, in the alternative, that in the event that Dewey's after acquired religious convictions were entitled to be reasonably accommodated under subsection (a)(2) of § 1605.1 of the 1966 EEOC guidelines:

> his employer did endeavor to make accommodation to the religious beliefs of its employees by interpreting the agreement so as to permit any employee assigned to overtime to be relieved from the assignment simply by arranging for another qualified employee to replace him. We hold that this was a reasonable accommodation.

Dewey, 429 F.2d at 335.

Subsequent to having considered and disposed of the controversy pursuant to the 1966 EEOC guidelines, the *Dewey* panel proceeded to consider the issues presented by applying § 1605.1(b) of the 1967 EEOC amendment to its guidelines that had been the anchor of the trial court's

resolution. The panel opinion, in a direct unequivocal passage, stated:

> But even if the 1967 regulations are applied, we think that Reynolds complied with Section 1605.1(b) thereof by making a reasonable accommodation to the religious needs of its employees when it permitted Dewey, by the replacement system, to observe Sunday as his Sabbath. He stubbornly refused to exercise this privilege. The finding of the District Court that Reynolds did not make reasonable accommodations to the religious needs of Dewey is not supported by substantial evidence and is clearly erroneous.

Dewey, 429 F.2d at 331 (footnote omitted).

To summarize the *Dewey* disposition, the panel concluded that:

1. The trial court should have applied the 1966 EEOC guidelines that were in effect when Dewey was discharged;

2. There was no duty imposed upon the employer by the 1966 EEOC guidelines to reasonably accommodate Dewey's religious convictions because he knew or had reason to believe that the requirements of the existing collective bargaining agreement would conflict with his subsequently acquired religious beliefs.

3. Even if Dewey's after acquired religious beliefs were entitled to be reasonably accommodated by subsection (a)(2) of Section 1605.1 of the 1966 EEOC guidelines, his employer's replacement program constituted a reasonable accommodation of his religious beliefs since the replacement program satisfied the mandate of the regulation.

4. Even if Dewey's charges were considered pursuant to Section 1605.1(b) of the 1967 amend-

ment, his religious needs had been reasonably accommodated, as noted above.

The *Dewey* panel's precedential declarations that the employer had satisfied its duty to reasonably accommodate the religious needs of Dewey by the standards of *either* the original or amended versions of EEOC guidelines where it had authorized a voluntary replacement program as an alternate procedure for working on Sabbath, even under circumstances where the employee refused to exercise the privilege because he believed that to do so would be a sin, constituted the law of the case. The panel's observations pioneered the definition of the terms "reasonable accommodation" and "undue hardship" which terms had not been defined in either the 1966 or 1967 EEOC guidelines or by Title VII of the 1964 Civil Rights Act or its 1972 congressional amendment. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 331 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971).

It is apparent from the *Dewey* decision that the panel's primary concern with the 1967 amendment of 29 C.F.R. § 1605.1 was the elimination of subsection (3)(b)(3) which significantly limited the employer's duty to reasonably accommodate the religious convictions of employees and the trial judge's retroactive application of the amendment. It is equally apparent that the panel was not concerned with, but rather accepted, the administrative mandate addressing the employer's duty to reasonably accommodate the religious needs of employees which had been incorporated into both the 1966 and 1967 versions of the regulation since the panel considered and decided the case by parallel, but independent, applications of both the 1966

and 1967 models of the rule. The substance of the decision and its precedential impact has withstood the passage of time and the critical scrutiny of legal commentators and remains intact, having received the affirmative endorsement of the Supreme Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977).

It is true that the *Dewey* decision attracted widespread legal notoriety subsequent to its publication. The attention was, however, prompted by the panel's casual observations as to an issue that it did not decide. In a post hearing addendum to its decision, issued subsequent to a vote of the entire court denying en banc reconsideration, the panel, after reaffirming its original reasoning, suggested that a construction of Title VII approving the adoption of regulations which compelled an employer to accede to or reasonably accommodate the religious beliefs of all of his employees could be offensive to the Establishment Clause of the First Amendment. The comment had no bearing or impact whatsoever upon the panel's enunciated law of the case. The comment did, however, stimulate debate among legal commentators and the judiciary of other circuits, and was interpreted by Congress as implicating an abuse of administrative rulemaking authority that enlarged the scope of Title VII beyond the congressional intent of the 1964 Act. To allay any doubt as to the scope of authority delegated to the EEOC to formulate guidelines imposing a duty upon employers to reasonably accommodate the religious convictions of its employees, Congress promulgated the 1972 § 701(i) amendment to the Act, which essentially incorporated the very language of the "reasonable accommodation" provisions

that appeared in both the 1966 and 1967 EEOC Regulations. Although the 1972 congressional amendment of the Act may be construed as an enlargement of Title VII, the substance of the change merely imputed legislative recognition of EEOC administrative mandates that had been effectively implemented by courts from as early as June 15, 1966, the legislative enlargement by the § 701(i) amendment did not warrant overruling the case law enunciated by the *Dewey* panel for reasons recognized by the Supreme Court in *Trans World Airlines v. Hardison,* 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed2d 113 (1977), and reviewing legal scholars.

The singular purpose of the § 701(j) amendment to the Act was to justify the EEOC formulation of the reasonable accommodation requirement that had been an integral element of both the 1966 and 1967 guidelines.[3] *Riley v. Bendix Corp.,* 464 F.2d 1113, 1116-17 (5th Cir. 1972).

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[3]Remarks of Senator Randolph who sponsored the amendment as memorialized in the Congressional Record clearly reflect the congressional intent:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
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> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved [the authority of the EEOC to promulgate the rules imposing upon the employer the duty to reasonably accommodate].

118 Cong. Rec. 705-06 (1972).

In 1977, the Supreme Court, upon revisiting *Dewey*, interpreted the § 701(j) amendment of the Act as congressional imprimatur of the EEOC's rulemaking authority to impose upon the employer a duty of reasonable accommodation. The Court's review comports favorably with the analysis of this dissent. After reflecting upon the evolution of both the 1966 and 1967 EEOC guidelines, the Court observed:

> The EEOC did not suggest what sort of accommodations are "reasonable" or when hardship to an employer becomes "undue."
>
> This question—the extent of the required accommodation—remained unsettled when this Court, in *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), affirmed by an equally divided Court the Sixth Circuit's decision in 429 F.2d 324 (1970). The discharge of an employee who for religious reasons had refused to work on Sundays was there held by the Court of Appeals not to be an unlawful employment practice because the manner in which the employer allocated Sunday work assignments was discriminatory in neither its purpose nor effect; and consistent with the 1967 EEOC guidelines, *the employer had made a reasonable accommodation of the employee's beliefs by giving him the opportunity to secure a replacement for his Sunday work.*

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73, 97 S.Ct. 2264, 2271, 53 L.Ed.2d 113 (1977) (emphasis added) (footnotes omitted).

Moreover, in footnote 8 of the *Hardison* opinion, the Court explained that:

> The conduct alleged to be an unlawful employment practice [in *Dewey*] occurred prior to the promulgation of the 1967 guidelines, and the Court of Appeals

> expressed the view that those guidelines should not be given retroactive effect. Also, an earlier ruling by an arbitrator was held to have conclusively resolved the religious discrimination question in favor of the employer. Finally, the employer in *Dewey* was not excused from a duty to accommodate; *the Court of Appeals simply held that the employer had satisfied any obligation that it might have had under the statute.*

Hardison, 432 U.S. at 73 n. 8, 97 S.Ct. at 2271 n.8 (emphasis added) (citation omitted).

In sum, any suggestion that the EEOC lacked authority to impose upon employers the duty to reasonably accommodate the religious needs of its employees was put to rest by the 1972 § 701(j) amendment to the Act. However, neither Congress nor the EEOC have suggested that "reasonable accommodation" requires an employer to do more than was done in *Dewey,* apparently having preferred to leave that issue open for resolution by the courts. *Hardison,* 432 U.S. at 74 n.9, 97 S.Ct. at 2272 n.9. Thus, the employer's sole obligation to make reasonable accommodations for the religious observations of its employees, short of incurring undue hardship, is presently clear, but the reach of that obligation has never been spelled out by either Congress or the EEOC. This Circuit's decision in *Dewey* was a first effort to fill the void by declaring that an employer had discharged its duty to reasonably accommodate the religious needs of Dewey by the standards of the 1967 EEOC guidelines where it had authorized a voluntary replacement program as an alternate procedure for working on his Sabbath, even under circumstances where the employee refused to exercise the privilege because he sincrely believed that to do so would be a sin.

That pronouncement, which identified but one course of action by which an employer could satisfy its duty to accommodate, has remained unquestioned and intact to this date and has been adopted by a consensus of the circuits that have addressed the issue. The instant case falls within the four corners of the *Dewey* decision.

Danny R. Smith (Smith), the plaintiff herein, was employed by Pyro Mining Company (Pyro), the defendant, as a mechanic responsible for repairing equipment in an underground coal mine from June 19, 1981 to August 23, 1982. Smith's presence on his crew was necessary to ensure the safety, efficiency and effectiveness of his unit. All mechanics such as Smith, who performed electrical work, were required to be certified electricians. Pyro was not permitted, by federal regulations, to operate a mine unit without a mechanic. Consequently, when a mechanic was absent from his job assignment, another qualified employee with contemporaneous duties was required to be substituted for the absent employee thereby compromising the production and safety of the mining unit's operation. Pyro maintained a uniformly enforced policy of terminating any employee having three unexcused absences in a six month period.

Smith, at all times material to this action, was a member of and a Sunday school teacher at the Independent Baptist Church of Cedar Hill, Kentucky. Although his church had no tenents against gainful Sunday employment, Smith asserted that he perceived his religious obligations as prohibiting him from working on his Sabbath, i.e., Sunday between the hours of 12:00 a.m. Saturday to 12:00 a.m. midnight Sunday.

On June 11, 1982, Pyro initiated an eight (8) day work week for production personnel employed in the mine where

Smith was assigned. Under this schedule, employees were assigned to work for four (4) consecutive ten (10) hour days out of eight (8) - four (4) days on then four (4) days off. Of the eight-day work week, employees were scheduled to work some, but not all, Sundays during the year. Prior to instituting the eight-day work week, Pyro operated a three-shift daily schedule. Most mechanics worked either a five-day work week [Monday through Friday], or a six-day work week [Monday through Saturday]. A few mechanics worked seven days a week. Smith occasionally worked the 11:00 p.m. Sunday night shift.

Prior to implementing the eight-day work week, Pyro advertised, through a video presentation, its policy of authorizing employees who objected to working on a Sabbath to trade or swap scheduled shifts with another qualified employee who was not also scheduled to work the same shift. Smith acknowledged that it was his responsibility to find a replacement if he did not desire to work on any Sunday.

In addition to the voluntary replacement program implemented by Pyro, it had an "open-door policy" whereby any employee who professed a work-related grievance or other problem could, in sequence, present the matter, first to his supervisor then up through channels to and including the president of the company for consideration and resolution. Smith had been furnished with a handbook explaining Pyro's open-door policy before it implemented its eight-day work week. Thus, it was common knowledge that when scheduled job shift assignments conflicted with religious observances, employees were initially required to arrange for a replacement by another qualified employee. In the event that the employee was unsuc-

cessful in arranging for his replacement, the employee was required to exhaust his remedies afforded by Pyro's open-door policy.

Smith was scheduled to work on both Sunday, July 11, 1982 and Sunday, August 15, 1982. He did not attempt to arrange a shift trade for either day. Rather, Smith telephoned Pyro on both scheduled Sundays and reported that he would be absent from work because he was attending church. Smith was assessed unexcused absences for both days.

Smith was scheduled to work on Sunday, August 15, 1982. In an effort to resolve Smith's conflict, David Dunbar (Dunbar), Smith's immediate supervisor, attempted to have his son, who was also employed by Pyro as a mechanic, replace Smith on his assigned August 22, 1982 work schedule. Dunbar's son was not available as a replacement for Smith on Sunday, August 22, 1982. Between August 15, 1982 and August 22, 1982, Smith made inquiry of only two of twenty qualified employees who worked shifts other than his to replace him so that he could observe his Sabbath. Both attempts were unsuccessful. Thereafter, Smith refused to request any employee to exchange shifts with him because he had concluded that it was improper for him to seek a replacement.

On August 22, 1982, Smith again notified Pyro that he would not report for work because he was attending church services. Smith was assessed a third unexcused absence for missing work on August 22, 1982 and, was accordingly, terminated on September 11, 1982 for having three unexcused absences in a six-month period.

As in *Dewey*, Pyro maintained neutral employment policies and practices that were uniformly applied. Under

its rotating work week, every underground miner was scheduled to work essentially an equal number of Saturdays and some Sundays. No employee was required to bear more than his or her fair share of weekend work and no employee was required to work every Sunday or other Sabbath. The uniform and equitable allocation of off days resulting from Pyro's rotating shift assignments "represented a significant accommodation to the needs, both religious and secular, of all of [Pyro's] employees," *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 78, 97 S.Ct. 2264, 2274, 53 L.Ed.2d 113 (1977). Accordingly, Pyro's eight-day work week satisfied the non-discriminatory mandate of Title VII.

As in *Dewey,* Pyro authorized a replacement program that permitted Smith the opportunity to accommodate his religious convictions if he elected to do so. As in *Dewey,* Smith refused to exercise the privileges of reasonable accommodation authorized by Pyro claiming that to do so would be inducing a third party to sin. Moreover, Smith refused to pursue and exhaust the remedies provided by Pyro's open door policy which had been inaugurated to resolve differences such as that posed by Smith's religious beliefs. Accordingly, pursuant to the pronouncements of *Dewey,* the employer, Pyro, satisfied its reasonable duty to accommodate Smith's religious beliefs and was therefore justified in discharging him.

Accordingly, I would respect the longstanding tradition of this court and follow this court's prior decision in *Dewey.*

As in *Dewey,* the Fifth and Tenth Circuits have recognized that the implementation of a flexible scheduling

system which permits employees to arrange replacements with other qualified co-workers satisfies the employer's duty of reasonable accommodation. *Brener v Diagnostic Center Hosp.*, 671 F.2d 141 (5th Cir. 1982); *United States v. City of Albuquerque*, 545 F.2d 110 (10th Cir. 1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2974, 53 L.Ed.2d 1092 (1977). The majority seeks to avoid the pronouncements of those legal precedents by factually distinguishing those decisions from the instant litigation.

Consistent with *Brener* and *Albuquerque*, the majority has acknowledged that the implementation of a neutral shift trade policy constitutes a reasonable accommodation of employee religious convictions. *See* Slip op. at 12. Nonetheless, the majority reasons that, in the instant case, Pyro's policy was not a reasonable accommodation because Smith had a sincere religious belief which prevented him from seeking another person to work in his stead.

Thus, the primary issue, more properly framed, confronted by this court is not one of sincerity, but rather a definition of a *religious belief*. Unfortunately, neither the Supreme Court nor the EEOC guidelines have afforded direction in defining the phrase as it is employed within the context of Title VII congressional or agency pronouncements addressing the term.

The purely subjective test adopted by the majority to fill the congressional hiatus, investing carte blanche discretion in the employee to bring virtually any personal belief within the protection of 42 U.S.C. 2000e(j) by merely characterizing it as a *religious belief*, is fraught with wide ranging hazardous economic and commercial consequences.

I would suggest that a more appropriate standard against which the term *religious belief* should be judged

is the objective test applied by the Supreme Court in *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), to identify a particular practice or belief as one to be afforded constitutional protection under the Free Exercise Clause of the First Amendment. In *Yoder,* the Supreme Court observed that, in order to qualify "a 'religious' belief or practice entitled to constitutional protection," an alleged belief must not be "merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." 406 U.S. at 215-16, 92 S.Ct. at 1533. Mere personal preferences or interpretations do not constitute "religious" beliefs because the "very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Id.* It would appear that *Yoder's* definition of *religious beliefs* is equally applicable in the Title VII context. *McCrory v. Rapides Regional Medical Center,* 635 F.Supp. 975 (D.L. La.), *aff'd mem.,* 801 F.2d 396 (5th Cir. 1986); *McGinnis v. United States Postal Serv.,* 512 F.Supp. 517, 520 n.2 (N.D. Cal. 1980); *Brown v. Pena,* 441 F.Supp. 1382, 1384-85 (S.D. Fla. 1977), *aff'd mem.,* 589 F.2d 1113 (5th Cir. 1979); *see also* 118 Cong. Rec. 705-06 (1972) ("I think in the Civil Rights Act we thus intended to protect *the same rights* in private employment *as the Constitution protects* in Federal, State or local governments.") (statement of Sen. Randolph) (emphasis added).

If construed as more than a pretextual *post hoc* justification for his failure to implement company policy, Smith's alleged belief that he could not seek another to work in his stead must be considered a mere personal

preference not entitled to the statutory protection set forth in 42 U.S.C. § 2000e(j). Having conceded that the tenents of his religion did not forbid him from working on his Sabbath and that he had not attempted to arrange for a replacement prior to his unexcused absences on July 11 and August 15, 1982, Smith testified that, only after he had twice been rejected by individuals who also preferred not to work on Sunday, August 22, 1982, "it came to me that if I was asking somebody else to work for me, I would be asking them to sin for me; and it wasn't right if I asked somebody to do something that I couldn't do; and I just didn't ask nobody else after that." He further attested that his personal religious perceptions would not have been offended if the company arranged for his replacement; however, he was unable to reconcile this apparent conflict with his assertion that it was improper for him to seek a replacement because he would be asking his replacement, whomever it would be, to sin because, according to Smith's perceptions, it was a sin for anyone to work on his, Smith's, Sabbath.

In light of the foregoing concessions, Smith's testimony belies the conclusion that his refusal to participate in the company's authorized replacement program was predicated upon a belief "of deep religious conviction, shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 216, 92 S.Ct. at 1533. The fact that Smith's miraculous revelation did not appear until he had been twice rejected in seeking a replacement reflected that his convenient revelation may not have been totally the product of a deeply held religious conviction. Moreover, the record is devoid of any evidence that Smith's refusal to implement company policy was predi-

cated upon a belief which was shared by other members of this religious sect.

Accordingly Smith's belief that he could not ask other employees to work in his stead does not appear to come within the definition of a "religious" belief protected by 42 U.S.C. § 2000e(j). Although Pyro had a duty to accommodate Smith's sabbatarian practices, it was under no obligation to satisfy Smith's purely subjective personal preference for a company arranged shift trade. In light of the foregoing, I find the majority's effort to distinguish *Brener* and *Albuquerque* unpersuasive and would apply the reasoning and conclusions of those cases to the instant case.

I am also concerned by the far reaching implications of the majority's disposition. The majority suggests that, by labeling any purely subjective personal preference as a "religious" belief or practice, an employee may effectively shift the entire burden of accommodation onto the employer.

However, it is well established that an employee is not invested with an absolute right to demand an accommodation on his own terms. Title VII "does not require employers to accommodate the religious practices of an employee in exactly the way the employee would like to be accommodated. Nor does Title VII require employers to accommodate an employee's religious practices in a way that spares the employee any cost whatsoever." *Pinsker v. Joint School District No. 28J*, 735 F.2d 388, 390-91 (10th Cir. 1984) (citing *Brener*, 671 F.2d at 145-46); *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039, 98 S.Ct. 778, 54 L.Ed.2d 788 (1978).

Moreover, an employer is not required to bear more than a *de minimis* cost in order to accomodate his employees' religious beliefs. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84, 97 S.Ct. 2264, 2277, 53 L.Ed.2d 113 (1977).

In *Ansonia Bd. of Educ. v. Philbrook,* — U.S. —, —, 107 S.Ct. 367, 372, 93 L.Ed.2d 305 (1986), the Supreme Court clearly stated that an employer is not required to select an employee-preferred procedure to accommodate his employee's religious needs, but rather may satisfy its statutory duty of accommodation by implementing any one of many reasonable alternatives available to the employee.

> We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. The employer violates the statute unless it "demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . hardship on the conduct of the employer's business." Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.

Thus, if the employer presents the employee with any accommodation that is reasonable, the employee must attempt to implement that accommodation, regardless of whether he would prefer some other course of action.

Finally, even the most cursory analysis of relevant Supreme Court precedent discloses that the majority's attempt to join the issue of undue hardship in the instant

controversy is misconceived. As the Supreme Court declared in *Ansonia,* "the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship." *Ansonia,* — U.S. at —, 107 S.Ct. at 372. In the present case, Pyro has demonstrated that it had satisfied its duty of reasonable accommodation by implementing a neutral policy of permitting employees to arrange their own shift trades. Thus, Pyro was not required to prove that the alternative accomodations suggested by Smith would have resulted in undue hardship. *Ansonia,* — U.S. at —, 107 S.Ct. at 372.

For the reasons stated above, I would reverse the judgment of the district court and remand this matter for entry of judgment in favor of Pyro.